Notes

Women Judges in Western Democracies: The Interaction Between Professional Paths and Prestige

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While women remain underrepresented in the judiciaries of all common law countries, they are increasingly outnumbering male judges in civil law countries. A number of scholars and policymakers explain this discrepancy with reference to the different methods by which judges are traditionally appointed in civil law and common law countries ("the professional path theory"). This Note explores the rationales underlying the professional path theory and adds another element to the equation. To explain the variance observed, this Note argues, the professional theory must be supplemented by an understanding of how women's success in attaining judgeship is affected by the relative prestige enjoyed by the judicial profession in each country ("the prestige theory").

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INTRODUCTION

Data on the judiciaries of Western democracies reveal a curious schism. In common law countries, women judges remain few and far between. In the United States, for example, women account for approximately thirty percent of state and federal judges.[1] This deficit

1. *See* TRACEY E. GEORGE & ALBERT H. YOON, AM. CONST. SOC'Y, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS 18 (2016) [hereinafter ACS] (noting that as of 2014, 30.22 percent of all American state court judges are women); *Biographical Directory of Article III Federal Judges, 1789–Present*, FED. JUD. CTR. [https://perma.cc/DW73-5BG3] [hereinafter FJC] (last visited Mar. 6, 2021) (under "Personal Characteristics and Background," select "Female" and "Limit to Sitting Judges") (demonstrating that 27.62 percent of sitting federal judges in the United States are women).

has been dubbed "the gavel gap"[2] and persists, to varying degrees, in all common law countries.[3] In contrast, many civil law countries have experienced a dramatic "feminization" of the judicial profession over the past decades.[4] Admittedly, a few civil law countries, such as Iceland, Norway and Switzerland, maintain noticeable gavel gaps.[5] However, the gavel gap has been reversed in a large number of civil law countries.[6] Indeed, women judges today outnumber male judges by a significant margin in a majority of European countries.[7] The most extreme example of this trend is Slovenia, where seventy-nine percent of judges are women.[8] While less pronounced, the civil law trend of feminization is also noticeable outside Europe. For example, the numbers of women judges in Algeria, Tunisia, and Lebanon are rapidly increasing and approaching equality.[9]

Noting this divergence, scholars have hypothesized that the variance stems from institutional differences between civil law and common law.[10] More specifically, they have pointed to the differences in

2. *See generally* ACS, *supra* note 1.

3. Among the eight common law countries included in this Note's data set, Canada, where forty-five percent of judges are women, has the most women judges. Scotland has the fewest women judges, with women occupying only twenty-seven percent of judgeships. On average, the common law countries in the data set have only about thirty-seven percent women judges. *See infra* Appendix.

4. *See, e.g.*, Céline Bessière et al., *Féminisation de la Magistrature: Quel est le Problème?* [*Feminization of the Judiciary: What's the Problem ?*], 36 TRAVAIL, GENRE ET SOCIÉTÉS [WORK, GENDER & SOC'YS] 175, 175 (2016); Madalena Duarte et al., *The Feminization of the Judiciary in Portugal: Dilemmas and Paradoxes*, 10 UTRECHT L. REV. 29, 33 (2014).

5. Among all the civil law countries included in the data set analyzed in this Note, Iceland has the fewest women judges, at thirty-seven percent of its judiciary. Meanwhile, in Switzerland and Norway, women represent forty-three and forty-four percent of the judiciary, respectively. *See infra* Appendix.

6. The average number of women judges in the thirty-three civil law countries included in this Note's data set is 59.2 percent. *See infra* Appendix.

7. Of the thirty-seven European countries included in this Note's data set, only nine countries maintain a gendered gavel gap. *See infra* Appendix. These countries are Albania, Moldova, Norway, Switzerland, Ireland, Iceland, England and Wales, Northern Ireland, and Scotland.

8. *Id.*

9. Women account for forty-two percent of judges in Algeria, about forty-three percent in Tunisia, and roughly forty-nine percent in Lebanon. *See* U.N. Econ. & Soc. Comm. for W. Asia, Women in the Judiciary in the Arab States: Removing Barriers, Increasing Numbers, 26, U.N. Doc. E/ESCWA/ECW/2019/2 (2019).

10. *See, e.g.*, Ulrike Schultz & Gisela Shaw, *Introduction: Gender and Judging*, *in* WOMEN IN THE JUDICIARY 1, 2 (Ulrike Schultz & Gisela Shaw eds., 2012):

the professional paths to judgeship, traditionally associated with common law and civil law.[11] The hypothesis of this theory, which I will call "the professional path theory," is that women are more likely to attain judgeships in countries where judges are selected by a rational and objective method shortly after graduating from law school.[12]

The professional path theory, perhaps because of its fairly obvious and concrete policy implications, has attracted wide attention from scholars, policy makers, and legal organizations.[13] However, the professional path theory leaves an important puzzle unanswered. As this Note will make clear, the rationales underlying the professional path theory cannot alone explain the excessive feminization of certain civil law judiciaries.[14]

This Note aims to demonstrate that the professional path theory cannot alone explain the variance observed in the numbers of women judges across Western democracies. From that, it follows that the professional path theory cannot alone provide governments with a blueprint for achieving gender diversity within the judiciary. Rather, this Note argues, the professional path theory must be supplemented with another theory that has gained far less attention.[15] I will call this theory

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> In civil law countries it is easier for women to enter the judiciary, as key access criteria for judicial office, such as formal qualification and examination results, are more rational and transparent and therefore more easily met by women than those in the common law world, where professional visibility, favourable evaluations of professional achievement, and access to—traditionally male—networks are of crucial weight."

11. *Id.* at 2–3.

12. *See supra* note 10 and accompanying text.

13. For example, many reports on diversity within the legal profession present versions of the professional path theory. *See, e.g.*, Int'l Dev. L. Org., *Women Delivering Justice: Contributions, Barriers, Pathways* 22, 36 (2018); Yvonne Galligan et al., *Mapping the Representation of Women and Men in Legal Professions Across the EU* 32 (2017) (presenting a study requested by the EU Committee on Legal Affairs); INT'L COMM'N OF JURISTS, WOMEN AND THE JUDICIARY: GENEVA FORUM SERIES NO. 1 at 4, 28 (2014). Additionally, in response to concerns underlying the professional path theory, a number of common law countries reformed their judicial appointment processes around the turn of the century in order to improve transparency. *See infra* notes 41–48 and accompanying text.

14. *See infra* Section III.A.

15. The German legal scholars Ulrike Schultz and Gisela Shaw have briefly floated the theory without explaining its underlying rationales: "In common law countries, the judiciary commands a higher social status as well as higher incomes, than in the civil law world. Both factors may work as hidden mechanisms to keep women out or hinder them from getting in." Schultz & Shaw, *supra* note 10, at 2. Meanwhile, Belgian legal scholar Adélaïde Remiche has argued that women's ability to attain judgeships depends in part on the imagined role of the judge within a country's legal community. *See* Adélaïde Remiche, *When Judging Is Power: A Gender Perspective on the French and American Judiciaries*, 3 J.L. & CTS. 95, 95 (2015). In her words, "the conceptualization of judging as an act of power works to keep

"the prestige theory." The hypothesis of the prestige theory, as outlined here, is that low professional prestige for judges facilitates women's entry into the judiciary. By contrast, high professional prestige acts as a barrier impeding women's entry into the judiciary.

Part I of this Note introduces the reader to the different roles, statuses, and professional paths of common law and civil law judges. It then turns to the question of whether judicial diversity matters. Next, Part II examines the rationales underlying the professional path theory—namely that women are more likely to attain judgeships in countries where the professional path to the judiciary is short and bureaucratic. It concludes that, although the professional path theory provides important answers, it leaves a major puzzle unanswered: the excessive feminization of certain civil law countries. Part III presents the prestige theory. It argues that the prestige theory solves the puzzle of civil law feminization and provides useful context for the numbers of women judges in other countries as well.

I. THE JUDICIAL PROFESSION IN COMMON LAW AND CIVIL LAW

A. The Role, Status, and Professional Path of Common Law Judges

The common law tradition dates back to twelfth-century England,[16] where King Henry II sought to create a unified national judiciary.[17] To that end, he created a set of national judges empowered to adjudicate conflicts based on local customs and their own best judgment.[18] In solving disputes, these judges developed the practice of treating previous decisions as binding authority under the doctrine of *stare decisis*.[19] Over the course of centuries, these ad hoc decisions matured into a vast body of substantive law called common law.[20]

Modern common law countries, of course, formally vest the lawmaking power in the legislature.[21] However, the common law

women off the bench" due to "the strong association that prevails between power and manliness." *Id.* at 95, 109.

16. *See generally History of the Judiciary*, CTS. & TRIBUNALS JUDICIARY [https://perma.cc/LH44-D6UG] [hereinafter CTJ]; JOHN P. DAWSON, ORACLES OF THE LAW 1–2 (1968).

17. DAWSON, *supra* note 16, at 1–2. *See also* CTJ, *supra* note 16.

18. DAWSON, *supra* note 16, at 1–2. *See also* CTJ, *supra* note 16.

19. *See* JANE C. GINSBURG, LEGAL METHODS 5 (2014).

20. *See* CTJ, *supra* note 16; DAWSON, *supra* note 16, at 59.

21. *See, e.g.*, U.S. CONST. art. I, § 1.

tradition continues to shape the form and perception of legal decision-making. Judge-made law, for example, still plays an important role in many common law countries—particularly the United States.[22] This results from two important legacies of the common law tradition that continue to shape common law legal cultures.

The first legacy is the doctrine of *stare decisis*, mentioned earlier, whereby common law judges continue to explicitly recognize and defer to judicial precedent.[23] In practice, this convention acknowledges the discretion which inheres in the judicial task of interpreting legal standards and applying them to real-world situations.[24] In the absence of judicial discretion, the doctrine of *stare decisis* would be superfluous, because, all else equal, applying the statutory rule would always yield the same result.

The second legacy of the common law tradition is an acceptance for judicial reliance on policy arguments—both in applying existing legal standards and fashioning new ones. Where "no legal solution clearly imposes itself on [the judge] from precedent, statute, or other legal standard," common law judges may rely on common sense and societal considerations in finding and justifying an answer.[25] In other words, the common law judge is overtly recognized as an agent with inherent law-making powers whose personal sense of fairness may come to shape the law.

This common law conception of the nature of judging elevates the status of the judicial profession. In the common law tradition, judges are viewed as powerful figures whose intellect and personal values play an important role in the administration of justice.[26] In the

22. *See* JOHN BELL, POLICY ARGUMENTS IN JUDICIAL DECISIONS 1–8, 226–44, 247 (1983) (arguing that the act of judging is inherently political in nature and finding that English judges act as legislators in relying on policy arguments and fashioning judicial rules based on policy determinations); RICHARD A. POSNER, LAW AND LEGAL THEORY IN ENGLAND AND AMERICA 33–34 (1997) (arguing that judicial lawmaking is particularly prevalent in the United States due to the political branches' failure to address policy concerns in a timely and effective manner).

23. *See* GINSBURG, *supra* note 19, at 7.

24. *See* Karl N. Llewellyn, *Case Law*, *in* 3 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 249 (1930) (describing the adherence to precedent as motivated by "that curious, almost universal, sense of justice which urges that all men are properly to be treated alike in like circumstances").

25. BELL, *supra* note 22, at 25.

26. *See* ANTOINE GARAPON & IOANNIS PAPADOPOULOS, JUGER EN AMÉRIQUE ET EN FRANCE: CULTURE JURIDIQUE FRANÇAISE ET COMMON LAW [JUDGING IN AMERICA AND IN FRANCE: THE FRENCH JUDICIAL CULTURE AND COMMON LAW] 159–63 (2003).

words of William Blackstone, common law judges are "living oracles."[27]

This elevated role is in turn reflected in the processes by which judges are selected. Common law countries typically have so-called "recognition judiciaries."[28] In recognition judiciaries, legal professionals are selected for judgeship based on personal characteristics and prior career achievements.[29] As such, judges are typically sourced from experienced professionals with distinguished careers in the government or private practice.[30] They are also typically appointed to a specific post without any expectation of further career advancement within the judicial hierarchy.[31] On national and federal levels, judges in common law countries are traditionally nominated and confirmed by the political branches of government.[32] In the United States, for example, federal judges are nominated by the President and confirmed by the Senate.[33] The President is not required to arrive at a decision by way of any particular procedure or according to any particular set of criteria.[34] While the President may, and frequently does, rely on evaluations provided by the American Bar Association or other interest groups in picking a nominee, the President is under no obligation to do so.[35] However, executive appointment is not the only path to

27. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *69.

28. *See* Nuno Garoupa & Tom Ginsburg, *Hybrid Judicial Career Structures: Reputations Versus Legal Tradition*, 3 J. LEGAL ANALYSIS 411, 411 (2011). However, in common law countries, judges in certain "pockets" of the judiciary are selected through processes more closely resembling the career judiciaries associated with civil law. *Id.* at 423–26. For example, American administrative law judges are appointed on the basis of a comprehensive written and oral test. *Id.* at 424. *See also* POSNER, *supra* note 22, at 30–31 (arguing that England in practice has a form of career judiciary if one conceives of barristers as low-level judges).

29. *See* GARAPON & PAPADOPOULOS, *supra* note 26, at 162 (describing common law judges as "personalities" chosen based on the creative reasoning that is expected of them).

30. *See, e.g.*, CARLO GUARNIERI & PATRIZIA PEDERZOLI, THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY 22–23 (2002) ("[In England,] judges have traditionally been recruited exclusively from among the smallest group within the legal profession, the barristers. The judiciary has, therefore, been drawn from an elite group currently numbering approximately 9,000."); POSNER, *supra* note 22, at 30, 32–33 ("[American judges] are at the top of a ladder. It takes many years to climb the rungs.").

31. Garoupa & Ginsburg, *supra* note 28, at 412.

32. *Professional Judges in the Common-Law Tradition*, BRITANNICA [https://perma.cc/W429-A5PV].

33. U.S. CONST. art. I, § 2, cl. 2. *See also The Executive Role in the Appointment of Federal Judges*, FED. JUD. CTR. [https://perma.cc/5GB2-FMGG] [hereinafter FJC].

34. *See* FJC, *supra* note 33.

35. *Id.*

judgeship in common law judiciaries. For example, most American state judges are selected by way of popular vote.[36] Going forward, I will nevertheless refer to the discretionary executive appointment process as "the common law path," given that it is the traditional common law path and near-ubiquitous on national and federal levels across modern common law countries.

Some scholars and judges have criticized the discretionary nature of the traditional common law appointment process, arguing that it fails to ensure that judges are selected by way of fair procedures and objective criteria.[37] As a result, they argue, the process is opaque and vulnerable to nepotism.[38] One Australian judge, testifying before the Australian Senate, explained her concern with the appointment process as follows:

> The judicial whisper goes around and someone ends up miraculously on the bench . . . Because there is all this mystique, as if it is somehow by magic that it happens, there is a perception . . . that it depends on who you know; that it is not based on any objective criteria . . . .[39]

This criticism is well-grounded in fact. It is no secret that personal connections, patronage, and political loyalty have played a significant role in judicial appointments throughout history.[40]

In response to the criticism against the traditional common law appointment path, some common law jurisdictions have adopted

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36. *Judicial Election Methods by State*, BALLOTPEDIA [https://perma.cc/FA3T-JH64].

37. *See, e.g.*, JOHN BELL, JUDICIARIES WITHIN EUROPE 312, 314 (2006) (discussing criticism of the unsystematic nature of the traditional English "consultation and soundings" process); Peter H. Russel, *Conclusion*, *in* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER 429 (Kate Malleson & Peter H. Russel eds., 2006) ("In the traditional common law appointing systems, . . . lack of transparency in how candidates for judicial office are assessed and selected has been a key accountability concern.").

38. *See, e.g.*, BELL, *supra* note 37, at 314 (describing the process of attaining judgeship in England as "depend[ing] on social connections, rather than any objective assessment").

39. Elizabeth Handsley, *'The Judicial Whisper Goes Around': Appointment of Judicial Officers in Australia*, *in* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER, *supra* note 37, at 122, 135 (quoting Justice Sally Brown).

40. *See, e.g.*, FJC, *supra* note 33 (chronicling the developments in the use of presidential discretion in judicial appointments throughout American history); Christian Farias, *How Trump Changed a Young Judge's Life*, ATLANTIC (Oct. 27, 2020) [https://perma.cc/339J-KQ2B] (examining the powerful personal connections of an unusually inexperienced federal appellate court appointee); Adam Dodek, *Politicians Become Judges, But Should Judges Become Politicians?*, POL'Y OPTIONS (Oct. 13, 2015) [https://perma.cc/9UB3-4BXH] (discussing notable Canadian politicians who were later awarded prestigious judgeships).

judicial reforms aimed at limiting executive discretion and bureaucratizing the appointment process. In the United States, a number of states have, since the 1940s, adopted variants of the so-called Missouri plan, which limit the governor's discretion to appoint state judges to a list of candidates nominated by an independent, non-partisan commission.[41]

Starting in the 1990s, a number of Canadian provinces developed similar appointments systems.[42] Under the Ontario system, any person who meets a number of basic qualifications may apply for a vacant judgeship.[43] An independent Judicial Appointments Advisory Committee reviews applications from all interested candidates and extensively interviews those it deems qualified.[44] The committee next provides the provincial government with a short list of three to four candidates, from which it may select an appointee.[45] In 2016, Canada adopted the same system for appointing justices to its federal supreme court, hoping to "promote greater openness, transparency, and accountability" and select qualified judges that "reflect a diversity of backgrounds and experiences."[46]

Ireland, Northern Ireland, England, Wales, and Scotland have also enacted statutes establishing judicial appointments committees. These committees are all responsible for reviewing applications according to fixed criteria and providing the executive with a shortlist of

41. *See Method of Selection*, STATE CTS. GUIDE [https://perma.cc/T5VP-RMLQ]. It is worth noting that this approach has numerous critics of its own. *See generally* Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751 (2009) (arguing that the Missouri plan fails to remove political considerations from the process and merely removes the discretionary decision to an un-elected body).

42. Ontario was the first province to create a Judicial Appointments Advisory Committee in 1995. *See Judicial Appointments Advisory Committee*, ONTARIO CTS. [https://perma.cc/Z9N6-JKNB].

43. *See id.*

44. *See id.*

45. *See id.*

46. THE NEW PROCESS FOR JUDICIAL APPOINTMENTS TO THE SUPREME COURT OF CANADA: REPORT OF THE STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS, HOUSE OF COMMONS 1, 4 (Feb. 2017). The Canadian federal government also relies on independent committees to vet candidates for judgeships on superior federal courts. *See* Kirk Makin, *Ontario System Eliminates Patronage in Choosing Judges, Proponent Says*, GLOBE & MAIL (Apr. 27, 2012) [https://perma.cc/8CWE-9N7E]. These federal committees, however, do not interview candidates. *See id.* They merely designate candidates as "recommended" or "not recommended," leaving the executive to choose among hundreds of potential candidates at its discretion. *Id.*

qualified candidates.[47] Further, the Scottish Judicial Appointments Board and the Judicial Appointments Commission for England and Wales are both mandated "to have regard to the need to encourage diversity," while the Northern Irish Judicial Appointments Commission must "make such arrangements . . . as will, so far as is practicable, secure that the membership of the Commission is reflective of the community in Northern Ireland."[48]

B. The Role, Status, and Professional Path of Civil Law Judges

The civil law system is a comparatively modern invention rooted in eighteenth century ideals of democracy and rationality. In a democracy, as envisioned by enlightenment thinkers like Montesquieu, the power to make law is reserved for the elected representatives of the people.[49] The judge, by contrast, is "only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor."[50] Any influence of a judge's personal opinion would constitute a breach of the democratic social contract.[51] The power held by civil law judges, therefore, is "invisible and null."[52]

Historically, of course, this was not how the kings of continental Europe conceived of the judiciary. Under the *ancien régime* in France, for example, judges held real political power. To raise funds, the government had sold off judgeships as private property—transferrable and devisable like pieces of land.[53] These judgeships automatically conferred nobility upon their holders and entitled them to engage in judicial review.[54] Since the state did not have the funds to buy back

47. *See* Courts and Court Officers Act, 1995 §§ 12–13 (Act No. 31/1995) (Ir.); Justice (Northern Ireland) Act 2002 pt. 1; Constitutional Reform Act 2005, pts. 3–4 (Gr. Brit.); Judiciary and Courts (Scotland) Act 2008, (ASP 6) § 9.

48. *See* Justice (Northern Ireland) Act 2002 pt. 1; Constitutional Reform Act 2005, pts. 3–4 (Gr. Brit.); Judiciary and Courts (Scotland) Act 2008, (ASP 6) § 9.

49. *See, e.g.*, MONTESQUIEU, THE SPIRIT OF THE LAWS 159 (Anne M. Cohler et al. eds., 1989) (1748).

50. *Id.* at 163.

51. *Id.* at 158 ("[J]udgments should be fixed to such a degree that they are never anything but a precise text of the law. If judgments were the individual opinion of a judge, one would live in this society without knowing precisely what engagements one has contracted.").

52. *Id.*

53. WILLIAM DOYLE, ORIGINS OF THE FRENCH REVOLUTION 68–69 (1999). *See generally* WILLIAM DOYLE, VENALITY: THE SALE OF OFFICES IN EIGHTEENTH-CENTURY FRANCE (1996) (chronicling the development of the French system of venality whereby the government raised funds through the sale of public offices).

54. DOYLE, ORIGINS OF THE FRENCH REVOLUTION, *supra* note 53, at 68.

judgeships, judges were, practically speaking, irremovable.[55] They created different legal procedures for different social classes and even required parties to pay the judge to have their conflicts resolved.[56] In the words of one revolutionary lawyer, the French judicial power had become "an imitator of the legislative power, revising, amending and rejecting the laws . . . ."[57] Public distrust in this *noblesse de robe* and their ability to fairly administer justice eventually played an important role in bringing about the French Revolution.[58] Later, when Napoleon I set out to reform the French judiciary, he ordered the production of a comprehensive legal code intended to cover every private dispute that could conceivably be brought before a judge.[59] Napoleon's *Code Civil* spread across the European continent along with his empire and became a source of inspiration for countries far beyond its reach.[60]

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55. *Id.* at 69.

56. *See* JACQUES GUILLAUME THOURET, DISCOURS SUR LA RÉORGANISATION DU POUVOIR JUDICIAIRE [DISCOURSE ON THE REORGANIZATION OF THE JUDICIAL POWER] 2–3 (1790):

> Le plus bizarre et le plus malfaisant de tous les abus qui ont corrompu l'exercice du pouvoir judiciaire, était que . . . [des] particuliers pussent acquérir à titre d'hérédité ou d'achat, le droit de juger leurs concitoyens, et que les justiciables fussent obligés de payer les juges pour obtenir un acte de justice . . . . Il y avait des tribunaux privilégiés et des formes de procédures privilégiées, pour de certaines classes de plaideurs privilégiés. [The most bizarre and harmful of all the abuses that corrupted the exercise of the judicial power was that . . . individuals could acquire, by devise or purchase, the right to judge their co-citizens, and that those in need of adjudication were made to pay judges for justice . . . . There were privileged tribunals and privileged procedures for certain classes of privileged pleaders.] (author's translation).

57. *Id.* at 2:

> Le second abus qui a dénaturé le pouvoir judiciaire en France était la confusion . . . des fonctions qui lui sont propres, avec les fonctions incompatibles et incommunicables des autres pouvoirs publics. Émule de la puissance législative, il révisait, modifiait ou rejetait les lois: rival du pouvoir administratif, il en troublait les opérations, en arrêtait le mouvement, et en inquiétait les agents. [The second abuse that deformed the judicial power in France was the confusion . . . of functions proper to the judiciary with the incompatible and non-transferable functions of other public powers. Emulator of the legislative power, the judiciary reviewed, modified or rejected the laws: rival of the administrative power, the judiciary troubled its operations, hampered its movement, and disturbed its agents.] (author's translation).

58. *See* RONNIE BLOEMBERG, THE DEVELOPMENT OF THE CRIMINAL LAW OF EVIDENCE IN THE NETHERLANDS, FRANCE AND GERMANY BETWEEN 1750 AND 1870, at 86 (2020); Doris Marie Provine & Antoine Garapon, *The Selection of Judges in France: Searching for a New Legitimacy*, *in* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER, *supra* note 37, at 176, 178–79.

59. *See* Charles Sumner Lobingier, *Napoleon and His Code*, 32 HARV. L. REV. 114, 117 (1918); Charles Sumner Lobingier, *The Napoleon Centenary and Its Legal Significance*, 7 AM. BAR ASS'N J. 383, 383–85 (1921).

60. *See* Lobingier, *Napoleon and His Code*, *supra* note 59, at 127–32. Indeed, Napoleon himself considered the creation of the *Code Civil* to be his greatest achievement. CHARLES-

Today, a large majority of the world's democracies have judiciaries that are, in some way or other, based on civil law codification.[61] In this inheres, as discussed above, the ideal of an apolitical judge who simply applies the code to the case at hand.

In France, the prototypical civil law country, precedent is not recognized as an official source of law, and judges do not invoke precedent to justify their decisions.[62] Deferring to precedent acknowledges the discretion that inheres in interpreting a legal text—and in the French civil law tradition, this is a power that judges are not supposed to have.[63] As a result, French judges tend to write opinions that are short and conclusory.[64] Further, French judges are not empowered to review laws for constitutionality.[65] Rather, the power of judicial review is vested in the Constitutional Council, an outgrowth of the Executive Branch comprised of former presidents and other politically-appointed members.[66]

TRISTAN DE MONTHOLON, RÉCIT DE LA CAPTIVITÉ DE L'EMPEREUR NAPOLÉON [ACCOUNT OF THE CAPTIVITY OF EMPEROR NAPOLOEON] 401 (1847) ("Ma gloire n'est pas d'avoir gagné quarante batailles . . . . Waterloo effacera le souvenir de tant de victoires . . . . Mais ce que rien n'effacera, ce qui vivra éternellement, c'est mon code civil . . . .") ["My glory is not having won forty battles . . . . Waterloo will erase the memory of so many victories . . . . But that which nothing will erase, that which will live forever, is my civil code . . . ."] (author's translation).

61. *Alphabetical Index of the 192 United Nations Member States and Corresponding Legal Systems*, JURIGLOBE [https://perma.cc/MTV7-SUN9].

62. *See* GINSBURG, *supra* note 19, at 67–68; GARAPON & PAPADOPOULOS, *supra* note 26, at 50.

63. Of course, it is a different question altogether whether French judges do in fact have discretion in interpreting the code and look to precedent for guidance in doing so. *See* GARAPON & PAPADOPOULOS, *supra* note 26, at 50. ("En effectuant cet indispensable travail d'interprétation, il arrive que le juge modifie de façon considérable la portée de la loi, mais ce Pouvoir ne pourra jamais être assumé en tant que tel dans la culture romano-germanique, selon laquelle toute affaire est *déjà* jugée par le code."). Translated into English, Garapon and Papadopoulos's observation is that civil law judges are in fact tasked with an "essential work of interpretation" and that "it happens that the judge significantly modifies the reach of the law, although this power could never be acknowledged within the [civil law legal culture], according to which every matter has already been judges by the code." Further, it is well known that French courts have been instrumental in the development of a number of substantive legal rights and duties. For example, French courts significantly expanded tort liability in the early twentieth century. *See* Edward A. Tomlinson, *Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking*, 48 LA. L. REV. 1299, 1301 (1988); HUGUES FULCHIRON & LAURENT ECK, INTRODUCTION AU DROIT FRANÇAIS [INTRODUCTION TO FRENCH LAW] 61 (2016).

64. *See* GINSBURG, *supra* note 19, at 67.

65. *See* Provine & Garapon, *supra* note 58, at 176, 180.

66. *Id.*

Other countries have adopted comprehensive codes inspired by the civil law tradition without completely revolutionizing their understanding of the judicial role.[67] For example, modern Scandinavian judiciaries are inspired by the continental civil law approach, but maintain legal practices and traditions that date back to the early Middle Ages.[68] Notably, Scandinavian judiciaries explicitly recognize precedent as a source of law—although such precedent generally is not considered binding.[69] Scandinavian courts also openly develop judge-made law.[70] Additionally, Scandinavian legal scholars and practitioners have historically paid close attention to developments in American legal theory and practice.[71] As a result, Scandinavian countries have all adopted their own versions of the American practice of judicial review for constitutionality.[72]

67. *See, e.g.*, BELL, *supra* note 37, at 234 (describing the Swedish judiciary as shaped by institutional continuity and incremental reform); ANINE KIERULF, JUDICIAL REVIEW IN NORWAY 40–41 (2018) (arguing that "court-made law" has remained "a central feature of the Norwegian legal system" despite the adoption of a "detailed civil and criminal code" because "jurists were accustomed to customary law as a legal source").

68. *See, e.g.*, Heikki Pihlajamäki, *Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared*, 52 AM. J. COMPAR. L. 469, 469, 484–87 (2004) (nuancing the categorization of Scandinavian countries as civil law jurisdictions and discussing the medieval origins of the Scandinavian practice of requiring professional judges to decide cases together with lay judges); KIERULF, *supra* note 67, at 40–41.

69. *See, e.g.*, KIERULF, *supra* note 67, at 40–41. In Norway, only decisions by the Norwegian Supreme Court are considered binding *prejudikat*. *See Prejudikat*, DET STORE NORSKE LEKSIKON [https://perma.cc/PBM9-6AUE].

70. In Norway, for example, judge-made law is called *ulovfestet rett*, which translates to "law not grounded in legislation." *See, e.g.*, Erik Monsen, *Sårstelldommen (Rt. 2010 s. 612) – Ulovfestet Rett På Legalitetsprinsippets Område*, SIMONSEN VOGT WIIG (June 11, 2013) [https://perma.cc/R2R7-ZHKX] (discussing the establishment of a narrow *ulovsfestet rett* in a case by the Norwegian Supreme Court allowing a nursing home to undertake basic necessary care against the patient's will). While less expansive than English common law, *ulovfestet rett* plays an important role in both substantive and procedural law. For example, the Norwegian rule of strict liability is rooted solely in Supreme Court precedent. *See* Norges Høyesterett, Lysakerdommen, Rt 1875, s 330 (Nor.) (holding the owner of an "inherently dangerous" nitrogen plant liable for an explosion without addressing the question of fault); Norges Høyesterett, Vannledningsdommen, Rt 1905, s 715 (Nor.) (holding local government liable for a water pipe explosion regardless of fault).

71. *See, e.g.*, RAGNHILDUR HELGADÓTTIR, THE INFLUENCE OF AMERICAN THEORIES OF JUDICIAL REVIEW ON NORDIC CONSTITUTIONAL LAW 104–16 (2006) (surveying the extent to which Scandinavian legal scholars discussed and relied upon developments in American constitutional law during the first half of the 20th century).

72. *See id.* at 249.

The civil law conception of judges is also reflected in their status and the ways in which they are recruited. Typically, civil law countries have so called "career judiciaries" in which judges are selected at a young age and work in the judiciary for the duration of their career.[73] Compared to their common law counterparts, civil law judges are conceived of as bureaucrats rather than powerful political figures.[74] They earn less, enjoy a comparatively lower status in society, and tend to come from less privileged social backgrounds than common law judges.[75] However, it is worth noting that research contrasting civil law and common law tends to focus on prototypical civil law countries. Thus, these generalizations do not capture the diversity of the many civil law jurisdictions that exist around the world.

For example, the prototypical civil law path to judgeship is found in countries like France, Spain, Italy, and Portugal.[76] In these countries, aspiring judges sit for an exam after law school that qualifies for entrance to judge school.[77] It is possible to enter the judiciary at a later stage in one's legal career—and increasingly so, as part of an attempt by some European governments to counteract the overwhelming feminization of their judiciaries.[78] However, the primary path towards judgeship in these prototypical civil law countries starts with an exam

73. *See* Garoupa & Ginsburg, *supra* note 28, at 411.

74. *See* BELL, *supra* note 37, at 14; GARAPON & PAPADOPOULOS, *supra* note 26, at 166–67.

75. *See, e.g.*, Émilie Biland & Hélène Steinmetz, *Are Judges Street-Level Bureaucrats? Evidence from French and Canadian Family Courts*, 42 L. & SOC. INQUIRY 298, 304–05 (2017) (analyzing the salary, social background, and social status of family court judges in France and Quebec, Canada).

76. *See* BELL, *supra* note 37, at 15, 52, 40–42.

77. *See* BELL, *supra* note 37, at 52–53 (Fr.); *id.* at 189–90 (Spain); Carlo Guarnieri, *The Judiciary in the Italian Political Crisis*, 20 W. EUR. POLS. 157, 171–72 (1997) (It.); *Ingresso na Formação Inicial [Admission to Initial Education]*, CENTRO DE ESTUDOS JUDICIÁRIOS [CENTER FOR JUDICIAL STUDIES] [https://perma.cc/3NMR-UQEF] (Port.).

78. In France, for example, separate entrance exams to the Ecole National de la Magistrature [the French National School for the Judiciary] (ENM) exist for civil servants and practicing lawyers. *See* BELL, *supra* note 37, at 52–53 (discussing the various institutionalized paths to judgeship in France). Historically, the vast majority of judges have been selected among recent law school graduates. *See id.* (stating that the ENM class profile of 2003 was "typical" and consisted of 220 recent law graduates, twelve civil servants, and five private practitioners). In recent years, however, France has undertaken reforms aimed at recruiting a greater number of experienced legal professionals to ENM. ÉCOLE NATIONALE DE LA MAGISTRATURE [FRENCH NATIONAL SCHOOL FOR THE JUDICIARY], LES CONCOURS D'ACCÈS À L'ÉCOLE NATIONALE DE LA MAGISTRATURE [THE ADMISSION EXAMS FOR THE FRENCH NATIONAL SCHOOL FOR THE JUDICIARY] 2 (2020).

right after law school, leading within a few years to a position as a low-level judge with the opportunity to advance within the judiciary.[79]

The prototypical civil law exam path is not ubiquitous, however. Scandinavia, once again, provides counterexamples. In Sweden, the most common path to judgeship is to apply for and complete a standardized series of short-term traineeships and term-limited positions within the judiciary upon graduation from law school.[80] Upon completing these steps, which take a total of six years, the aspiring judge is qualified to apply for judgeship.[81] However, it is also possible to apply for vacant judgeships after gaining significant legal experience elsewhere in Sweden.[82] Meanwhile, in Norway, aspiring judges may apply for short-term positions as assistant judges upon graduation from law school.[83] The path to attaining actual judgeship, however, is much longer.[84] Applicants are expected to have practiced law for a minimum of ten years, and the typical successful candidates for judgeship are in their late forties.[85] The Danish path to judgeship is similar to that found in Norway.[86] Like in many common law countries, judges are appointed by the executive branch upon recommendation from an independent committee of judges, legal practitioners, and bureaucrats.[87] In other words, the Scandinavian paths to judgeship are in

79. *See supra* note 78 (discussing the example of France); BELL, *supra* note 37, at 14–15 (noting that bureaucratic judiciaries have "career judges" who are selected at a young age and rise through the ranks of the judiciary over time).

80. *Domarbanan* [*The Path to Judgeship*], SVERIGES DOMSTOLAR [SWEDEN'S CTS.] (Aug. 16, 2019) [https://perma.cc/E3SA-R3VD].

81. *See id.*

82. *See id*.

83. *See Bli Dommerfullmektig* [*Become Assistant Judge*], NORGES DOMSTOLER [NORWAY'S CTS.] [https://perma.cc/EH5K-4LWU].

84. *See id.*

85. *See Tidligere Yrkeserfaring* [*Previous Professional Experience*], INSTILLINGSRÅDET FOR DOMMERE [JUD. NOMINATION COMM.] [https://perma.cc/SU8U-UT3P]; *Alder* [*Age*], INSTILLINGSRÅDET FOR DOMMERE [JUD. NOMINATION COMM.] [https://perma.cc/8CD5-DM9M].

86. *Dommerfuldmægtig* [*Assistant Judge*], DANMARKS DOMSTOLE [DENMARK'S CTS.] (Aug. 11, 2020) [https://perma.cc/ZAY8-ZWHG]; *Vejen til en Dommerstilling* [*The Path to Judgeship*], DOMMER I DAG [JUDGE TODAY] [https://perma.cc/BZJ9-YK3T].

87. *See Medlemmer* [*Members*], INSTILLINGSRÅDET FOR DOMMERE [JUD. NOMINATION COMM.] [https://perma.cc/MDE9-4LQT] (describing the judicial appointment process in Norway); *Domarnämnden* [*The Judicial Nomination Committee*], SVERIGES DOMSTOLAR [SWEDEN'S CTS.] [https://perma.cc/GTJ5-NBXU] (describing the judicial appointment process in Sweden).

many ways closer to the traditional common law path than the prototypical civil law path.

Other countries mix the prototypical common law and civil law paths to judgeship in different, and sometimes illuminating, ways. In Brazil, for example, the constitution provides that a majority of low-level judges are to be sourced by way of the prototypical civil-law exam path.[88] A small percentage of low-level judgeships, however, are set aside for legal professionals entering the judiciary by way of executive appointment.[89] Higher up in the judiciary, the ratio of judgeships reserved for executive appointees rises. At the top, the Brazilian judiciary is crowned by a Supreme Court consisting entirely of judges appointed by the executive.[90]

C. The Case for Judicial Diversity

Historically, legal scholars advocating for gender diversity on the bench have emphasized the existence of gendered differences between men and women—and the impact gender diversity may have on judicial outcomes.[91] In particular, scholars have argued that judicial diversity is necessary to ensure judicial fairness.[92] Judges rely on their values and life experiences to determine what outcome will best serve society.[93] Ensuring that women are represented on the bench would therefore "add a new dimension of justice to our courts . . . ."[94] Several pioneering women judges have also subscribed to this view. Bertha

88. *See* Maria Angela de Santa Cruz Oliveira Jardim & Nuno Garoupa, *Choosing Judges in Brazil: Reassessing Legal Transplants from the United States*, 59 AM. J. COMPAR. L. 529, 534–36 (2011).

89. *See id.*

90. *Id*. at 536–39.

91. *See, e.g.*, Erika Rackley, *What a Difference Difference Makes: Gendered Harms and Judicial Diversity*, 15 INT'L J. LEGAL PRO. 37 (2008) (analyzing the jurisprudence of Baroness Hale and the ways in which it was impacted by her womanhood); ERIKA RACKLEY, WOMEN, JUDGING AND THE JUDICIARY: FROM DIFFERENCE TO DIVERSITY 27 (2013) (arguing that the case for diversity must be "grounded in difference"). *See also* Kate Malleson, *Justifying Gender Equality on the Bench: Why Difference Won't Do*, 11 FEMINIST LEGAL STUD. 1, 2–5 (2003) (criticizing the dominant approach of justifying diversity with difference).

92. *See, e.g.*, Sheldon Goldman, *Should There Be Affirmative Action for the Judiciary?*, 62 JUDICATURE 488, 494 (1979) (arguing that "[a] judge who is a member of a racial minority or a woman cannot help but bring to the bench a certain sensitivity—indeed, certain qualities of the heart and mind—that may be particularly helpful in dealing with [cases involving racial and sexual discrimination]").

93. *See id*.

94. *Id*. at 489.

Wilson, for example, the first female Canadian Supreme Court Judge, described women's entry into the judiciary as a movement that would "[infuse] the law with an understanding of what it means to be fully human."[95] And in the words of Baroness Hale, the first female British Supreme Court Justice, "the experiences of leading [women's] lives should be just as much part of the background and experience which shapes the law as leading men's lives has been for centuries."[96]

Framed in terms of gendered difference, the issue of judicial diversity garnered greater interest in common law countries than in civil law countries. This is not surprising, given that the common law tradition explicitly conceives of judges as powerful actors whose personal vantage point may come to shape public policy.[97] In civil law countries, the notion that a judge's gender could impact judicial outcomes would be considered inappropriate.[98] The first woman appointed to preside over the French *Cour de Cassation* once explained that the question of whether women judge differently than men frustrated her greatly.[99] "That's confusing the law and the judge. I've never done anything guided by femininity in my professional capacity."[100] Notwithstanding this point, in practice, civil law judges are also required to make judgment calls in interpreting legal texts.[101] In some respects, civil law judges can even be considered to wield more discretionary power than their common law counterparts due to the civil law judge's role as an investigating finder of facts.[102] The

95. Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 OSGOODE HALL L.J. 507, 521–22 (1990).

96. Rackley, *What a Difference Difference Makes: Gendered Harms and Judicial Diversity*, *supra* note 91, at 41 (quoting a lecture given by Baroness Hale at Plymouth University in 2003).

97. *See supra* Section I.A.

98. *See supra* Section I.B.

99. *See* Muriel Gremillet, *"Comme Juge, Je N'Ai Jamais Été Guidée par le Féminin"* [As Judge, I Have Never Been Guided by Femininity], LIBÉRATION (Apr. 10, 2007, 7:08 AM) [https://perma.cc/67EB-CV69].

100. *Id.*

101. *See supra* note 63 and accompanying text.

102. Italian scholars Guarnieri and Pederzoli make that case as follows:

> [U]nder the non-adversarial (or 'inquisitorial') arrangement, parties to the dispute are not the main actors. Once legal action has begun, even in civil litigation, the process tends to lose its private nature and to become a state affair. It is controlled by a judge who is expected to represent interests other and higher than those of the litigants. Hence, the judge is given control over the entire sequence of events, from the preliminary stage through to the trial. This active role expands the scope of judicial powers, especially in the preliminary phase. Here, the judge has extensive powers over fact-finding and determines when the case is ripe for adjudication. These prerogatives also extend to the conduct of the

potential impact of gendered differences on judicial decision-making, therefore, ought to be a concern in any legal system. Admittedly, attempts to empirically assess whether diversity has an effect on judicial outcomes have been inconclusive.[103] While some studies have found that gender can be predictive of the outcome in certain types of cases—particularly those involving sexual harassment—many have found no such connection.[104]

In recent years, there has been a shift away from justifying judicial diversity based on the positive impact of gender diversity on judicial outcomes.[105] The British legal scholar Kate Malleson, for example, framed her critique of difference-based justifications as follows: "If gender difference is the basis for gender equality, then what happens if it is proved that no significant differences exist? Or that they do exist but disappear before women have achieved equal participation? Or that they exist but do not improve the quality of justice?"[106] Instead, these scholars argue, the quest for diversity is justified by basic principles of fairness and institutional legitimacy.[107] First of all, "women should have the same chances as men to develop their careers and public life."[108] And further, democratic institutions—courts included—should reflect society at large.[109]

This last perspective is also shared by policy makers concerned with the overwhelming feminization of certain European judiciaries, leaving men starkly underrepresented in the judiciary.[110] In France, where women have long accounted for over seventy percent of new judges, the Justice Department's Senior Official for Gender Equality,

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trial, and judges are able personally to interrogate both the parties in dispute and witnesses without any intervention by the lawyers representing the parties.

GUARNIERI & PEDERZOLI, *supra* note 30, at 122.

103. For a survey of the empirical research published on the impact of gender on judicial decision-making, see Malleson, *supra* note 91, at 5–7.

104. *Id.*

105. *See, e.g.*, *id.* at 13–15; SALLY J. KENNEY, GENDER & JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER 3–13 (2012).

106. Malleson, *supra* note 91, at 14.

107. *See generally* Malleson, *supra* note 91; KENNEY, *supra* note 105.

108. Malleson, *supra* note 91, at 17.

109. *See id.* at 18–20.

110. *See, e.g.*, Anaïs Coignac, *Féminisation de la Magistrature et Retour à la Mixité* [*Feminization of the Magistracy and Return to Diversity*], LA SEMAINE JURIDIQUE [JUD. WEEK] 414, 415–16 (Mar. 4, 2019) (discussing statements by policymakers, government officials, and law professors).

Isabelle Rome, has emphasized that "in modern democracy, we must have institutions that represent society."[111]

II. THE ANSWERS PROVIDED BY THE PROFESSIONAL PATH THEORY

In this part, I will explore the two rationales underpinning the professional path theory—namely that women are more likely to attain judgeship in countries where the professional path to judgeship is short and bureaucratic. To contextualize these rationales, I will start with a discussion of how women's careers are harmed by biological constraints and the persistence of gendered stereotypes and private inequalities.

A. The Harmful Effects of Biological Constraints, Private Inequalities, and Gender Bias on Women's Careers

1. Biological Constraints

First, many women's career progress is slowed down by the process of human reproduction. It is an obvious and inescapable reality that the physical and psychological burdens of pregnancy, childbirth, and the early phases of childrearing fall on women. Unfortunately, this often comes at a professional cost for women.[112] Most importantly, it causes women to take more frequent and longer leaves

111. *Id*. at 415 ("La féminisation n'est pas un problème en soi mais dans une démocratie moderne, nous devons avoir des institutions qui représentent la société.") ["Feminization is not a problem in and of itself, but in a modern democracy we must have institutions that represent society at large."] (author's translation).

112. *See, e.g.*, Margarita Estévez-Abe, *Gender Bias in Skills and Social Policies: The Varieties of Capitalism Perspective on Sex Segregation*, 12 SOC. POL.: INT'L STUD. GENDER, STATE & SOC'Y 180, 190 (2005) (providing a framework for understanding skill depreciation in the context of women's career interruptions); Marie Evertsson & Ann-Zofie Duvander, *Parental Leave—Possibility or Trap? Does Family Leave Length Affect Swedish Women's Labour Market Opportunities?*, 27 EUR. SOCIO. REV. 435 (2010) (finding that Swedish women's parental leaves had a negative effect on their careers); Ulrike Schultz, *'I Was Noticed and I Was Asked . . .' Women's Careers in the Judiciary. Results of an Empirical Study for the Ministry of Justice in Northrine-Westfalia, Germany*, *in* GENDER AND JUDGING 145, 158–60 (Ulrike Schultz & Gisela Shaw eds., 2014) (recounting female lawyers and judges' experience with combining their careers with motherhood); Thea N. Dahl, *Kvinner Slutter Fortsatt Som Advokat Etter Barn Nummer To* [*Women Still Leave the Legal Profession After Child Number Two*], ADVOKATBLADET [LAWYER MAG.] (Mar. 8, 2021) [https://perma.cc/6T5M-GLNM] (reporting that female lawyers in Norway tend to leave private practice after having their second child).

than their male peers.[113] This, in turn, means that women are more likely than men to experience skill depreciation, miss out on valuable professional opportunities, and suffer from harmful interruptions in their relationships with clients and colleagues.[114] Additionally, biology demands that aspiring mothers tackle the project of childrearing at a relatively early age, while aspiring fathers may postpone the project much longer.[115] This requires many women to set their careers on hold in a formative time of their professional development—sometimes in ways that cannot be made up for later.[116]

2. Private Inequalities

Further, the careers of many women in heterosexual relationships suffer from the persistence of gendered inequalities in the division of labor in the home and in the family.[117] Research indicates that a majority of women and men in heterosexual relationships continue to conform to traditional gender roles in many important respects. Notably, women are more likely than men to take extended leaves, work part-time, and quit their jobs to take care of children.[118]

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113. *See* Estévez-Abe, *supra* note 112.

114. *Id.*; Evertsson & Duvander, *supra* note 112.

115. *See* Prac. Comm. Am. Soc'y for Reprod. Med., *Optimizing Natural Fertility: A Committee Opinion*, 100 FERTILITY & STERILITY 631, 631 (2013) ("Fertility . . . declines with age in both men and women, but the effects of age are much more pronounced in women. For women, the chance of conception decreases significantly after age 35 . . . . [M]ale fertility does not appear to be affected before approximately age 50.").

116. An example of such a situation is the up-or-out model that traditionally has been the rule among big law firms. *See* Michael Allen, *Up or Out: The 5 Things You Need to Do to Make Partner*, ABOVE THE LAW (Sept. 2, 2016, 1:28 PM) [https://perma.cc/8CX9-VA3H] (describing the commitment required from young associates to stay on partnership track); ROBERTA D. LIEBENBERG & STEPHANIE A. SCHARF, AM. BAR ASS'N, WALKING OUT THE DOOR: THE FACTS, FIGURES, AND FUTURE OF EXPERIENCED WOMEN LAWYERS IN PRIVATE PRACTICE 1, 10 (2018) [hereinafter ABA] (showing that women leave big law at disproportionate rates and thirty-two percent of women view the lack of opportunity for advancement in their firm as an important reason for leaving).

117. *See, e.g.*, NANCY BURNS ET AL., THE PRIVATE ROOTS OF PUBLIC ACTION: GENDER, EQUALITY, AND POLITICAL PARTICIPATION 325–26 (2001) (showing how women's participation in public life is inhibited by the persistence of gendered inequalities in the home).

118. This owes in part to the fact that many fathers do not have the option of taking parental leave. For example, parental leave has only recently been introduced to the world of big law. *See* Kathryn Rubio, *Trend Alert: Another Biglaw Firm Expands Gender-Neutral Parental Leave*, ABOVE THE LAW (July 29, 2019, 3:15 PM) [https://perma.cc/X683-KHAQ]. However, the persistence of gendered norms and expectations also plays a role. *See, e.g.*, Rudy R. Seward et al., *Parental Leave and Father Involvement in Child Care: Sweden and*

If they do return to work, women continue to spend significantly more time than their male partners on childrearing, homemaking, and other family-related tasks.[119] For example, a 2018 ABA survey of American lawyers found that only one percent of male lawyers viewed it as their full responsibility to arrange for childcare, compared to fifty-four percent of female lawyers.[120] Further, only four percent of male lawyers viewed it as their full responsibility to leave work for childcare, take children to their extracurricular activities, or provide evening childcare.[121] For women, the respective numbers were thirty-two percent, twenty percent, and seventeen percent.[122] While single women spend more time on housework than single men in the first place, this gendered gap seems to be reinforced in most heterosexual relationships.[123] These private inequalities between men and women are likely to have a negative impact on women's careers in all lines of work, because they leave women with fewer hours in the day to spend on their careers. The effect might be particularly deleterious for women in the legal profession, where success is often measured by the number of hours billed. Gendered time constraints and inequalities in the home may also keep women from participating in and reaping the benefits from a broad range of other activities at the same rate as men—such as attending social events, serving as directors on corporate boards, or running for political office.[124] This, in turn, might cause women to miss out on valuable opportunities to expand their social and political networks or gain experiences that would be valuable for their professional development.

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the United States, 33 J. COMPAR. FAM. STUD. 387, 390 (2002) (finding that Swedish men remained reluctant to take advantage of generous policies regarding paternity leave).

119. *See, e.g.*, Lyn Craig & Killian Mullan, *How Mothers and Fathers Share Childcare: A Cross-National Time-Use Comparison*, 76 AM. SOCIO. REV. 834, 853 (2011) (finding that mothers spent more time than fathers on childcare and household care in the four Western countries studied, with gender being a better predictor than employment status or relative earning capacity).

120. ABA, *supra* note 116, at 12.

121. *See id*.

122. *See id*.

123. *See Exactly How Much Housework Does a Husband Create?*, UNIV. OF MICH. INST. FOR SOC. RSCH. (Apr. 3, 2008) [https://perma.cc/2UQR-76Z2].

124. *See, e.g.*, Elena Greguletz et al., *Why Women Build Less Effective Networks Than Men: The Role of Structural Exclusion and Personal Hesitation*, 72 HUM. RELS. 1234, 1234 (2019) (finding that women build smaller networks and utilize them less effectively in part due to family-career conflicts).

3. Gender Bias

Finally, women risk being held back in their careers by both unconscious bias and outright discrimination and harassment. The group-level biological and private inequalities discussed above color employers' perception of individual female employees and job candidates.[125] It is well-documented, for example, that employers discriminate against young women in hiring processes due to the costs that their childbearing and childrearing could potentially entail for the business.[126] Further, women's careers may be held back by traditional gender stereotypes and expectations about what women are like and how they should behave.[127] First, women may be held back by so-called descriptive stereotypes, whereby others unconsciously attribute traditionally "feminine" characteristics to them.[128] Where these feminine characteristics are considered unsuitable for the particular professional role or task at hand, women battle negative performance expectations from the get-go.[129] Second, women may be penalized by so-called prescriptive stereotypes if they act in ways that do not conform to others' gendered expectations.[130] Thus, characteristics that otherwise are conducive to professional success may, if violating society's expectations of femininity, hold women back.[131] This is not unique to women, of course: descriptive and prescriptive masculine stereotypes influence the perception of men as well.[132] However, in a professional context, the harmful effects of traditional gender stereotypes disproportionately impact women. In professional cultures historically dominated by men, such as the legal profession, women are less likely

125. *See* Estévez-Abe, *supra* note 112, at 190 ("Even when individual women are determined to put their careers first, they still face problems because of employers' fear that women are more likely than men to quit.").

126. *See, e.g.*, Sascha O. Becker et al., *Discrimination in Hiring Based on Potential and Realized Fertility: Evidence from a Large-Scale Field Experiment*, 59 LABOUR ECON. 139, 139 (2019); Carrie Kerpen, *Should You Disclose Your Pregnancy in a Job Interview?*, FORBES (May 5, 2018, 10:19 AM) [https://perma.cc/H743-VU6K].

127. *See* Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women's Ascent Up the Organizational Ladder*, 57 J. SOC. ISSUES 657, 657 (2001). It is important to emphasize that such gendered stereotypes and expectations are held by both men and women. *See, e.g.*, Corinne A. Moss-Racusin et al., *Science Faculty's Subtle Gender Biases Favor Male Students*, 109 PROC. NAT'L ACAD. SCI. 16474, 16477 (2012).

128. *See* Heilman, *supra* note 127, at 660.

129. *Id.* at 661.

130. *Id.* at 660–61.

131. *See id.*; VIRGINIA VALIAN, WHY SO SLOW? THE ADVANCEMENT OF WOMEN 125–27 (1998).

132. *See* Heilman et al., *supra* note 127, at 661.

to be seen as a "good fit" for the role and more likely to be penalized for acting in a way that clashes with stereotypes.[133] There is also abundant evidence showing that even people who are committed to goals of gender equality maintain and act on subconscious gender biases.[134]

4. Internalization of Barriers

Finally, women's careers may be held back by their internalization of the challenges discussed above. A wealth of psychological research shows that women subconsciously internalize both gendered stereotypes and expectations as well as gendered negative feedback.[135] The comparatively low self-confidence which results, as well as subconscious attempts and desires to conform to societal ideals of femininity, may hold women back in their educational and professional pursuits—or cause them to abandon certain pursuits altogether.[136] The most well-documented example of this pattern is that of women and STEM. While young girls and boys rate their interest in math and science at near equal levels, the gap widens dramatically as they grow older.[137] Girls and young women consistently underestimate their own performance and come to believe that they are not performing at a sufficiently high level to pursue a STEM degree.[138] Further, women

133. *See* Cynthia Grant Bowman, *Bibliographical Essay: Women and the Legal Profession*, 7 AM. U.J. GENDER, SOC. POL'Y & L. 149, 149–50 (1998); Eve B. Burton, *More Glass Ceilings Than Open Doors: Women as Outsiders in the Legal Profession*, 65 FORDHAM L. REV. 565, 570 (1996); Madeleine E. Heilman et al., *Has Anything Changed? Current Characterizations of Men, Women, and Managers*, 74 J. APPLIED PSYCH. 935, 935 (1989).

134. *See, e.g.*, VALIAN, *supra* note 131, at 125.

135. *See id.* at 145–66; Anna Fels, *Do Women Lack Ambition?*, HARV. BUS. REV., Apr. 2004, at 50 [https://perma.cc/JB5C-93X4]:

> Most women . . . associate ambition with egotism, self-aggrandizement, or manipulation . . . . In childhood, the research uncovered, girls are clear about their ambitions. Their goals are grand, and they make no apologies for them . . . . Yet there are dramatic differences in how women and men create, reconfigure, and realize (or abandon) their goals.

136. *See generally, e.g.*, Fels, *supra* note 135; Greguletz et al., *supra* note 124 (showing that women utilize their social networks less effectively than men in part due to gendered notions of modesty).

137. *See, e.g.*, Jessica Ellis et al., *Women 1.5 Times More Likely to Leave STEM Pipeline After Calculus Compared to Men: Lack of Mathematical Confidence a Potential Culprit*, PLOS ONE, July 13, 2016, at 1, 10; Joyce Ehrlinger & David Dunning, *How Chronic Self-Views Influence (and Potentially Mislead) Estimates of Performance*, 84 J. PERSONALITY & SOC. PSYCH. 5, 11 (2003).

138. *See, e.g.*, Ehrlinger & Dunning, *supra* note 137, at 1 ("Women performed equally to men on a science quiz, yet underestimated their performance because they thought less of their general scientific reasoning ability than did men.").

internalize the reality that they are, for the reasons discussed above, less likely than men to achieve their career goals—and that vigorously pursuing their career goals at a young age may compromise their ability start a family.[139] There are reasons to believe that these patterns impact women's careers in a number of fields, including the legal profession. For example, an EU-sponsored survey of legal professionals in France, Italy, Spain, and Romania showed that while both young men and women expressed high degrees of interest in leadership positions within their career tracks (eighty-seven and seventy-nine percent, respectively), men dramatically outnumbered women among those who actually acted on their ambition (sixty-one and twenty-two percent, respectively).[140]

B. The Equalizing Effect of Shorter Paths to Judgeship

The first tenet of the professional path theory, which I will call the "short path hypothesis," posits that women are more likely to attain judgeship in countries where one becomes a judge in the early stages of one's professional career.[141]

The rationale underlying the short path hypothesis, as discussed here, is relatively straightforward. Women are more likely to be recognized as qualified candidates if they are considered for judgeship in the early stages of their career, because over time they are likely to suffer gendered career setbacks relative to their male peers.

The persistence of gendered career setbacks is clearly reflected in statistics on the legal profession in the United States. While male and female associates are compensated at equal levels at the beginning of their career, female associates fall behind over time and eventually

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139. *See, e.g.*, Sarah Isgur, *The New Trend Keeping Women Out of the Country's Top Legal Ranks*, POLITICO (May 4, 2021, 4:30 AM) [https://perma.cc/SA7P-CXWD] (discussing how the informal requirement of multiple clerkships discourages women from pursuing Supreme Court clerkships). *See also* Anne Boigeol, *Feminisation of the French 'Magistrature': Gender and Judging in a Feminised Context*, *in* GENDER AND JUDGING, *supra* note 112, at 125, 130.

140. *See id.* at 131.

141. While Shultz and Shaw have explicitly laid out the bureaucratic path hypothesis, the short path hypothesis is only implicit in their writing:

> In comparing developments regarding women judges in different countries, it is important to keep in mind that . . . [i]n civil law countries, a judicial career is one of a number of separate career paths open to law graduates, which means that judges start their careers at the age of between twenty-five and thirty-five. By contrast, in common law countries, judges are chosen from among experienced legal practitioners, the key criterion being professional achievement.

Schultz & Shaw, *supra* note 10, at 2.

come to earn less than male associates.[142] At the top, women today account for only twenty-one percent of equity partners in U.S. big law firms—even though women have accounted for more than twenty-one percent of law students since 1974 and half of all law students for the past decade.[143] The numbers are improving, but there is still a long way to go. Women have accounted for almost fifty percent of summer associates at big law firms since at least 2009, but only accounted for thirty-eight percent of new partners in 2019.[144] Further, while female equity partners work as many hours as their male colleagues, their billable rates are eight percent lower and their median income is nine percent lower.[145] Gendered biases impact women's ability to perform in the legal profession. For example, Supreme Court justices interrupt female lawyers arguing before them earlier, more frequently, and for longer than they interrupt male lawyers.[146] Similarly, female Supreme Court Justices are more likely to be interrupted by the lawyers arguing before them than their male colleagues are.[147]

In jurisdictions with long paths to judgeship, the fact that women lawyers, as a group, fall behind their male colleagues over time should logically result in fewer women judges (unless men do not seek judgeship or female candidates are actively prioritized). As discussed, common law recognition judiciaries typically source judges who have practiced law for decades.[148] For example, in the United States, the

142. *See* NAT'L ASS'N WOMEN LAWS., SURVEY REPORT ON THE PROMOTION AND RETENTION OF WOMEN IN LAW FIRMS 3, 4 (2019) (finding that the median male associate earns $8,959 more a year than the median female associate despite having started with the same salary).

143. *See id.* at 3, 7; *Statistics Archives*, ABA [https://perma.cc/P45B-KM6A] (showing data by filtering on "First-Year-Enrollment/Total Enrollment/Degrees Awarded 1963–2013" under "Longitudinal and Historical Data").

144. *See* NAT'L ASS'N FOR L. PLACEMENT, 2018 REPORT ON DIVERSITY IN U.S. LAW FIRMS 9 (2019); Stephanie Russell-Kraft, *Law Firms Show Slow Progress as Women Land 38% of New Partnerships*, BLOOMBERG L. (Dec. 31, 2018) [https://perma.cc/2JSL-YF8H].

145. *See* DESTINY PEERY, REPORT OF THE 2018 NAWL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 7 (2018).

146. *See* Dana Patton & Joseph L. Smith, *Lawyer, Interrupted: Gender Bias in Oral Arguments at the US Supreme Court*, 5 J.L. & CTS. 337, 337 (2017). It is worth noting, however, that the pattern is reversed in cases involving gender-related issues. *Id.*

147. *See* Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379, 1440 (2017) (finding that female Supreme Court justices are two to three times more likely to be interrupted than male justices).

148. *See* BELL, *supra* note 37, at 14–15. In recognition judiciaries, sometimes called professional judiciaries, judges are appointed years or decades into their professional careers.

average age of a federal judge at the time of appointment is around fifty years.[149] The problem identified by the short path hypothesis is that, at that point, relatively few women remain competitive candidates. This is not because women are not qualified, but because women's careers, on a group level, lag behind those of men due to biological constraints, private inequalities, and gendered biases. As such, women are less likely than their male peers to attain judgeship in a recognition judiciary with a long path to judgeship. By comparison, judiciaries with shorter paths to judgeship should be more accessible to women, because women and men compete for judgeship at a point in their careers when they are more equally positioned. In France, for example, the majority of judges are recruited by way of an exam that may be taken right after law school and that requires that the candidate be no older than thirty-one years.[150] Ironically enough, women's subsequent trajectories within career judiciaries also lend support to the professional path theory: In the countries where women are overrepresented in the judiciary, they tend to be concentrated in the lower levels of the judicial hierarchy.[151]

C. The Equalizing Effect of Bureaucratic Paths to Judgeship

The second tenet of the professional path theory, which I will call the "bureaucratic path hypothesis," posits that women are more likely to attain judgeship in countries where the path to judgeship is transparent, standardized, and objective.[152]

They typically are appointed for a specific post and do not expect to be promoted within the judicial hierarchy. *See id.*

149. This number has been relatively stable for the past forty years. *See Demography of Article III Judges, 1789–2020*, FED. JUD. CTR. [https://perma.cc/R4UF-K7TP]; *Status of Magistrate Judge Positions and Appointments—Judicial Business 2019*, U.S. CTS. [https://perma.cc/2SSH-8L6B].

150. *See Devenez Magistrat* [*Become a Judge*], MINISTÈRE DE LA JUSTICE [MINISTRY OF JUSTICE] (Jan. 13, 2020) [https://perma.cc/MX77-F75W].

151. *See* EUR. COMM'N FOR THE EFFICIENCY OF JUST., EUROPEAN JUDICIAL SYSTEMS: EFFICIENCY AND QUALITY OF JUSTICE, CEPEJ STUDIES NO. 26, at 112 (2018).

152. Schultz & Shaw, *supra* note 10, at 2:

> In civil law countries it is easier for women to enter the judiciary, as key access criteria for judicial office, such as formal qualifications and examination results, are more rational and transparent and therefore more easily met by women than those in the common law world, where professional visibility, favourable evaluations of professional achievement, and access to – traditionally male – networks are of crucial weight.

This hypothesis also mirrors research showing that women are more likely to run for political office, and successfully secure a party nomination, if the nomination process follows clear and

The rationale underlying the bureaucratic path hypothesis is rooted in the same issues that underpin the short path hypothesis: the pernicious effects of private inequalities and gender biases. The idea is that opaque and discretionary appointment systems allow bias and networking to play a greater role, often working in women's disfavor. By contrast, transparent selection systems that follow fixed procedures and require judicial appointments to be based on objective criteria may help minimize the impact of bias and circumscribe patronage.[153] Additionally, the existence of clear procedures and qualification metrics may encourage women to apply.[154]

To better understand the mechanisms of the bureaucratic path hypothesis, it is helpful to take a closer look at a couple of different paths to judgeship. Let us first revisit the American path to federal judgeship, which provides a poignant example of an opaque and unbureaucratic path. Candidates must be approved by Congress, but the President has free rein to nominate whomever he or she desires.[155] There are no formal requirements, neither with respect to a candidate's qualifications nor the process by which he or she is nominated.[156] In the case of federal district court judges, the decision is traditionally left to the senator of the state in which the court is located.[157] Presidents also from time to time rely on the advice of special interest groups, federal agencies, the American Bar Association, and private practitioners.[158] There are a great number of positions to fill and a large pool of potential candidates, and it is often unclear exactly why someone has—or has not—been considered or appointed. According to the bureaucratic path hypothesis, this process is likely to disadvantage women for several reasons. First, potential candidates that are qualified but not well-connected are unlikely to be considered. Second, the discretionary nature of the process makes it vulnerable to the impact of unconscious (or even conscious) biases against women.

On the other end of the spectrum are countries that attempt to systematically evaluate all interested candidates against a fixed set of

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bureaucratic rules. *See, e.g.*, Richard E. Matland, *Institutional Variables Affecting Female Representation in National Legislatures: The Case of Norway*, 55 J. POL. 737, 737 (1993).

153. *See* Schultz & Shaw, *supra* note 10.

154. *See supra* Section II.C.

155. *See supra* Section I.A.

156. *See id.*

157. *See* DENIS STEVEN RUTKUS, CONG. RSCH. SERV., RL34405, ROLE OF HOME STATE SENATORS IN THE SELECTION OF LOWER FEDERAL COURT JUDGES 1 (2013).

158. BARRY J. MCMILLION, CONG. RSCH. SERV., R44235, SUPREME COURT APPOINTMENT PROCESS: PRESIDENT'S SELECTION OF A NOMINEE 14 (2020).

criteria. France provides a particularly radical example. There, the primary path to judgeship requires the candidate to take one of three exams, each of which is open to any interested candidate with a particular set of formal qualifications.[159] The exams are coupled with in-person interviews, language tests, and psychological evaluations.[160] Prior years' exam topics are made available online alongside a written report in which the jury explains what they were looking for throughout the process.[161] According to the bureaucratic path hypothesis, this process should make the judiciary more accessible to women. First, it ensures that all qualified and interested candidates are considered, regardless of whether they are politically connected. Second, it sets out fixed procedures and criteria by which candidates will be ranked, limiting the influence of bias.[162]

The French model is only one example of a bureaucratic path, however. For example, Norway's path to judgeship is effectively a bureaucratized version of the traditional common law appointment process. Judges are formally appointed by the executive branch, but the selection process is overseen by the judicial branch according to fixed and transparent procedures.[163] First, the judiciary publicly announces the vacant judgeship, accepting applications from any candidate that meets a set of formal requirements.[164] Second, the judiciary creates an ad hoc nomination committee comprised of judges, lawyers, and laypersons.[165] The nomination committee then evaluates the applications and, after oral and written deliberation, interviews the

159. *See Devenez Magistrat*, *supra* note 150; ÉCOLE NATIONALE DE LA MAGISTRATURE [FRENCH NATIONAL SCHOOL FOR THE JUDICIARY] [ENM], LES CONCOURS D'ACCÈS À L'ÉCOLE NATIONALE DE LA MAGISTRATURE [THE ENM ADMISSIONS EXAMS] (2020).

160. *See* PIERRE BAILLY, RAPPORT SUR LES TROIS CONCOURS D'ACCÈS À L'ÉCOLE NATIONALE DE LA MAGISTRATURE [REPORT ON THE THREE ENM ADMISSIONS EXAMS] 4 (2015) [https://perma.cc/YQ5B-4MZV].

161. *See id.*

162. Bias may, of course, still factor into the process—particularly during the interviews and psychological evaluations. For example, men are consistently scored higher on the oral section of the exam. *See* Boigeol, *supra* note 139, at 128. However, at the very least, the process requires decision-makers to rank candidates and record the basis for their decisions.

163. *See Søknadsprosessen* [*The Application Process*], INNSTILLINGSRÅDET FOR DOMMERE [THE JUDICIAL NOMINATION COMMITTEE] (Oct. 2015) [https://perma.cc/6YD9-QETJ].

164. *See id.*

165. *See 1. Om innstillingsrådet og dommerutnevninger* [*1. About the Judicial Nomination Committee and Judicial Appointments*], INNSTILLINGSRÅDET FOR DOMMERE [THE JUDICIAL NOMINATION COMMITTEE] [https://perma.cc/UX6A-8AYY].

candidates considered most interesting.[166] The committee must evaluate candidates according to a set of detailed principles, criteria, and objectives.[167] The committee is also provided written guidance on how to compare and evaluate various professional experiences.[168] The committee eventually makes public a list of three nominees from which the executive may choose.[169] The common law countries that have reformed their paths to judgeship have, to varying degrees, adopted similar bureaucratic procedures.[170] Like the French approach, this modified appointment path is bureaucratic in nature: It attempts to fairly and systematically evaluate all interested and qualified candidates. According to the bureaucratic path hypothesis, this path makes the judiciary more accessible to women by minimizing the the impact of gendered biases and the importance of political connections.

D. The Puzzle Left Unanswered by the Professional Path Theory

There is much support for the theory that the length and structure of professional paths to judgeship can bar or facilitate women's access to the judiciary by either accentuating or alleviating the harmful effects that biological constraints, private gender inequalities and bias have on women's careers.[171] However, a quick glance at the number of women judges across Western judiciaries suffices to identify a major puzzle left unanswered by the professional path theory: Why have women come to dominate the judiciaries of a large number of civil law countries?

In sixteen European countries, the ratio of women judges now exceeds sixty percent.[172] In the most extreme cases, Slovenia and

166. *See 14. Gjennomføring av Intervjuet* [*The Interview Process*], INNSTILLINGSRÅDET FOR DOMMERE [THE JUDICIAL NOMINATION COMMITTEE] [https://perma.cc/J4B2-VENB].

167. For example, between 2003 and 2016, nomination committees were instructed to prioritize female candidates in the event that two candidates were equally qualified. *See 9. Kjønn* [*9. Gender*], INSTILLINGSRÅDET FOR DOMMERE [THE JUDICIAL NOMINATION COMMITTEE] [https://perma.cc/DX9H-X4LT].

168. For example, nomination committees are instructed to prioritize candidates with experience in a broad range of fields and candidates who have previously served as assistant judges. *See Tidligere Yrkeserfaring* [*Previous Professional Experience*], INNSTILLINGSRÅDET FOR DOMMERE [THE JUDICIAL NOMINATION COMMITTEE] [https://perma.cc/TW9S-6E3C].

169. *Id.*

170. *See supra* Section I.A.

171. *See supra* Part II.

172. The countries are Portugal (61%), Russia (61%), Czech Republic (61%), Slovakia (63%), Lithuania (63%), Estonia (63%), Bosnia and Herzegovina (64%), France (66%),

Latvia, the ratio of women judges is approaching eighty percent.[173] The trend is pointing upward and, unless policymakers intervene, other European countries may eventually approach similar ratios of women judges.[174] Scholars discussing the phenomenon have dubbed it the "feminization" of European judiciaries.[175]

The rationales underlying the professional path theory predict that a short and bureaucratic path will serve as an equalizer, evening the playing field for men and women seeking judgeship. This could, in two circumstances, lead to feminization. First, evening the playing field could lead to a feminization of the judicial profession to the extent that women outnumber men among those entering the legal profession in the first place. However, in these countries the ratio of women judges does not seem to reflect the ratio of women in the profession overall.[176] And while women increasingly do outnumber men in law school in many countries, they also enter the judiciary at disproportionate rates.[177] Second, evening the playing field could have a feminizing effect if women on average outperform men. However, there is no indication that underperformance is keeping men from entering civil law judiciaries.[178]

Thus, the professional path theory provides a convincing but partial explanation for the varying numbers of women judges across Western judiciaries. The feminization of civil law judiciaries simply cannot logically be explained by the professional path theory.

Luxembourg (68%), Hungary (69%), Serbia (71%), Croatia (71%), Greece (71%), Romania (74%), Latvia (78%), and Slovenia (79%). *See infra* Appendix.

173. *See id.*

174. In many countries, the ratio of women is much higher among newly appointed judges than among judges over all. For example, in 2009, women accounted for sixty-one percent of judges in France—but seventy-four percent of judges in the early stages of their careers. Boigeol, *supra* note 139, at 125–26. Similarly, in the decade between 2001 and 2010, women accounted for between sixty-two and ninety percent of the entering class of the primary judicial training program in the Netherlands. Bregje Dijksterhuis, *Women Judges in the Netherlands*, *in* GENDER AND JUDGING, *supra* note 112, at 267, 269.

175. *See, e.g.*, Boigeol, *supra* note 139, at 125–26; Dijksterhuis, *supra* note 174, at 268–73.

176. For example, in France women accounted for 60% of law students in 2009, but 84.6% of candidates applying to the *École nationale de la magistrature*, or "judge school." *See* Boigeol, *supra* note 139, at 125.

177. *See, e.g.*, Emmanuel Vaillant, *Ces Filières de Filles qui Manquent de Garçons* [*These Educational Tracks Are Lacking Boys*], L'ÉTUDIANT [STUDENT] (Apr. 21, 2011) [https://perma.cc/27NE-YWG5].

178. For example, male candidates seeking to enter the French *École nationale de la magistrature* are, on average, rated higher than female candidates during oral examinations. *See* Boigeol, *supra* note 139, at 128.

III. THE ROLE OF PRESTIGE

The professional path theory, as described in Part II, cannot fully account for the variation in the numbers of women judges across Western democracies. This Note argues that the professional path theory must be supplemented by a theory of professional prestige. This Part first provides an outline of the professional prestige theory, arguing that the relative prestige of judgeships within a country's judicial profession impacts women's success in entering the judiciary. In sum, the theory posits that high professional prestige is likely to magnify the difficulties that women encounter on their professional path to judgeship—while low professional prestige is likely to reduce them. Next, this Part argues that the professional prestige theory both explains the puzzling feminization observed in certain civil law judiciaries and provides helpful context for understanding the challenges faced by common law countries seeking to achieve gender equality on the bench.

A. The Professional Prestige Theory

1. The Impact of Prestige on the Competitiveness of a Jurisdiction's Professional Path to Judgeship

The prestige theory posits that the negative effects on women's careers stemming from biological constraints, private inequalities, and gender bias—as described in Part II—are greater in contexts of high professional prestige and lower in contexts of low professional prestige. Therefore, the theory predicts that it is harder for women to attain judgeship in countries where judges enjoy high professional prestige than in countries where judges enjoy low professional prestige.

The professional prestige theory relies on two simple factual assumptions. First, the theory assumes that there is greater competition over prestigious positions than over non-prestigious positions: Prestigious professional positions attract high-achieving candidates who work hard to attain their professional goals. Next, the theory assumes that men, on average, gravitate towards positions associated with power and prestige to a greater extent than do women.[179] As such, men are likely to be overrepresented in professional paths associated

179. For research supporting this assumption, see, for example, Carmen Nobel, *Men Want Powerful Jobs More Than Women Do*, HARV. BUS. SCH. WORKING KNOWLEDGE (Sept. 23, 2015) [https://perma.cc/657J-2JEW]; Francesca Gino et al., *Compared to Men, Women View Professional Advancement as Equally Attainable, but Less Desirable*, 112 PROC. NAT'L ACAD. SCI. 12354, 12354 (2015).

with power and prestige. In the context of judiciaries, these two assumptions combine to an understanding that a country's path to judgeship is likely to be more or less competitive and sought-after by men depending on the extent to which judgeships are considered prestigious within that country's legal culture.

Against this backdrop, the professional prestige theory provides two rationales for why women are more likely to attain judgeship in contexts of low professional prestige, and less likely to attain judgeships in contexts of high professional prestige. Both argue that the extent to which a profession is prestigious has an effect on the magnitude and impact of the negative effects that biological constraints, private inequalities, and gender bias have on women's careers.

First, the professional prestige theory posits that gendered obstacles are more impactful on women's careers in contexts where women and men compete in equal numbers, or where male candidates outnumber female candidates—and, conversely, that gendered inequalities are less likely to translate into career setbacks in professional contexts where women largely are competing with other women. For example, in a context where women hardly compete with men for professional advancement—as is the case in many professions dominated by women—their careers are less likely to be damaged by maternity leaves or disproportionate responsibility for child-rearing, because these experiences are shared by a larger percent of the candidate pool. By contrast, gendered obstacles are likely to translate into career setbacks when men constitute a large portion of the professional pool and set the standards according to which women are evaluated.

Second, the professional prestige theory posits that gendered obstacles are greater and more impactful in contexts where women are competing with men for prestigious positions. There are two reasons for this. First, the prestige associated with a profession may magnify certain gendered obstacles—such as unconscious biases. Research shows that prestige is, in various ways, associated with masculinity.[180] This connection between masculinity and prestige may magnify subconscious biases against women in prestigious professions. Next, the competitiveness of a professional path is likely to magnify the gendered obstacles faced by women. The impact of a gendered career setback—resulting, for example, from taking a number of family-related leaves or having a limited ability to work on weekends—is likely

180. *See, e.g.*, Lynn S. Liben et al., *Pink and Blue Collar Jobs: Children's Judgments of Job Status and Job Aspirations in Relation to Sex of Worker*, 79 J. EXPERIMENTAL CHILD PSYCH. 346, 346 (2001) (finding that children, when presented with a profession with which they were unfamiliar, ranked it as more prestigious when portrayed by a man than when portrayed by a woman).

to be greater in a highly competitive context where a large number of ambitious professionals are competing over a limited set of coveted positions.

Therefore, if women are in fact at a competitive disadvantage vis-à-vis men due to biological constraints, private inequalities, gendered biases, and self-imposed barriers, as argued in Part II, the professional prestige theory predicts that women will be underrepresented in highly competitive professions. With respect to judiciaries, the implication of this theory is that the number of women judges depends on the relative prestige of the legal profession compared to other professions and the relative prestige of judgeships within that country's legal culture.

2. The Overlap Between the Professional Path Theory and the Professional Prestige Theory

Before discussing the implications of the professional prestige theory, it is important to note how that theory to some extent overlaps with the professional path theory.

A country's cultural understanding of the role and power of judges is naturally reflected in the professional path to judgeship, both in terms of length and character. If the judicial profession enjoys high prestige due to the recognition of judicial discretion and law-making power, it makes sense for that to be reflected in a longer and more politicized path. For example, it is inconceivable for federal judges in the United States to be selected by way of a post-law school exam. That is not, of course, due to a lack of commitment to transparency or gender equality, but due to the perceived role of the judge in American legal culture. In a legal culture where judges are considered to wield significant political powers,[181] it seems only reasonable to select them at an age at which they have built a track record of doing things one way or another. Similarly, it makes sense to give the executive branch the flexibility to pick candidates based on ideology and accumulated professional accomplishments, rather than some quantifiable, objective post-law school measure.

Meanwhile, if the judicial profession is relatively unprestigeous—for example due to a perception that judges are mere functionaries mechanically meting out justice based on blueprints provided by the legislature[182]—it is logical for judges to be selected among younger jurists through standardized procedures. If the job entails only

181. *See supra* Section II.C.

182. *See supra* Section II.B.

straightforward application of rules, why require decades of experience or consider the candidate's personal beliefs?

However, the length and rationality of judicial paths do not perfectly reflect the relative status of the judicial profession. For one, the prestige of a country's judiciary may have changed since the institutional path to judgeship was forged. Further, the country's path to judgeship may have been designed, reformed, or amended in response to factors other than the judiciary's prestige. For example, many Eastern European countries have created or changed their judiciaries and paths to judgeship based on recommendations from the European Union as part of their application for membership.[183] And, in many countries, the path to judgeship was not endogenously developed or voluntarily adopted, but imposed by a colonial power. Therefore, explicitly recognizing the role played by prestige—rather than implicitly accounting for it through the professional path theory—allows for a more precise understanding of women's path to judgeship within and across countries.

B. Professional Prestige as a Driver of the Puzzling Feminization of Civil Law Judiciaries

The professional path theory explains how the short and bureaucratic paths to judgeship found in many civil law countries can help women achieve parity. However, it cannot explain why women have come to dramatically outnumber men in these judiciaries. The prestige theory offers a compelling—but disheartening—explanation.

As discussed in Part I, judges enjoy widely disparate levels of prestige across different jurisdictions and legal cultures. And, in prototypical civil law countries, judgeships are not particularly prestigious—both compared to other career paths within the legal profession within those countries and to common law judgeships.[184] Rather than powerful political figures, civil law judges are seen as bureaucrats with little to no discretion.[185] Women's success in entering these judiciaries may be predicated precisely on that low professional prestige.[186]

183. *See The 2019 EU Justice Scoreboard* COM (2019) 198/2, at 44; *see also* Leonid Bershidsky, *Post-Communist Europe Still Doesn't Trust Its Courts*, BLOOMBERG OP. (Nov. 8, 2019 9:48 AM) [https://perma.cc/WJ2F-R486].

184. *See supra* Sections I.A. and I.B.

185. *See supra* Section I.B.

186. Over the past decades, scholars have also argued that the prestige of high-status professions tends to decrease once women enter the profession due to a societal devaluation of women. *See, e.g.*, John C. Touhey, *Effects of Additional Women Professionals on Ratings*

One piece of evidence supporting this theory is the fact that male law students in many of these countries express little interest in the judicial profession.[187] In France, for example, the national judge school has long been struggling to attract male applicants.[188] A survey conducted by the *École nationale de la magistrature*, the school that trains French judges, found that young men considered a career in the judiciary to be "financially uninteresting" and associated it with "feminine values" like predictability and stability.[189] Practicing as a lawyer, by contrast, was associated with "masculine values" such as competitiveness, risk taking, and prestige.[190] As discussed earlier, judges in many civil law countries enjoy much lower levels of social and political prestige than their common law counterparts due to their (perceived) lack of discretion and inability to set precedent.[191] While common law judgeships tend to crown a successful and remunerative career, seeking civil law judgeships amounts to committing to a career as a civil servant on a government pay scale. In these jurisdictions, male law students seem to prefer professional tracks that come with larger paychecks and higher social status. The lack of male interest may have made the judiciary a relatively easy target for the first generations of women entering the legal profession—particularly when coupled with a short, bureaucratic path to judgeship. In a civil law judiciary where ambitious men aim for careers in the private sector, the judiciary provides women with a safe harbor.

European political history provides additional reason to believe that professional prestige plays a role in the feminization of civil law judiciaries. Of the sixteen European countries with a ratio of women

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of Occupational Prestige and Desirability, 29 J. PERSONALITY & SOC. PSYCH. 86, 86 (1974) (finding that college students associate women's entry into a high-status profession with a loss of prestige). The devaluation theory would suggest that the entry of women into civil law judiciaries reinforced or even *caused* the low status of judgeships in these civil law countries. However, the devaluation theory has been all but rebuked. *See, e.g.*, Michael C. White et al., *Ratings of Prestige and Desirability: Effects of Additional Women Entering Selected Business Occupations*, 7 PERSONALITY & SOC. PSYCH. BULL. 588, 588 (1981); Charlotta Magnusson, *Gender, Occupational Prestige, and Wages: A Test of Devaluation Theory*, 25 EUR. SOCIO. REV. 87, 87 (2009).

187. *See, e.g.*, Boigeol, *supra* note 139, at 126 ("[T]he number of male applicants [to the French *École nationale de la magistrature*] is extremely low, reflecting the fact that overall a judicial career is not an attractive proposition for them given the position of the *magistrature* within the legal field."); Dijksterhuis, *supra* note 174, at 269 (noting that "mainly women apply" to become judges in the Netherlands); Bessière et al., *supra* note 4, at 178.

188. *See* Boigeol, *supra* note 139, at 126.

189. *See* Bessière et al., *supra* note 4, at 178–79.

190. *Id.*

191. *See supra* Section I.B.

judges above sixty percent, all but two are either authoritarian states or young democracies emerging out of authoritarianism.[192] Russia was, of course, part of the Soviet Union and remains an authoritarian state today.[193] Hungary and the formerly-united Czech Republic and Slovakia were puppet states of the Soviet Union, while Latvia was a member state.[194] Croatia, Slovenia, Serbia, and Bosnia & Herzegovina were part of the Republic of Yugoslavia.[195] Greece and Portugal were each ruled by dictators and military juntas for approximately half of the twentieth century.[196] These experiences may have left the public with a perception of judges as powerless or corrupt. In the Soviet Union, for example, judges were marginalized and subordinate to political power: "They were not powerful in the sense of having sensitive jurisdiction and their . . . legal discretion was curbed through government policies expressed in court and party resolutions."[197] According to reports from the European Commission, public trust in courts continues to be very low in post-communist Europe.[198] The two remaining countries with over sixty percent of women judges—France and Luxembourg—have not experienced similarly notable democratic crises in recent memory. However, as discussed in Section I.B., France has a long history of public distrust in the judiciary—which played a role in developing the curtailed perception of a judge's role and power that prevails in many civil law countries today. In all of these countries, it

192. The sixteen countries where more than sixty percent of judges are women are: Portugal (61%), Russia (61%), Czech Republic (61%), Slovakia (63%), Lithuania (63%), Estonia (63%), Bosnia and Herzegovina (64%), France (66%), Luxembourg (68%), Hungary (69%), Serbia (71%), Croatia (71%), Greece (71%), Romania (74%), Latvia (78%), and Slovenia (79%). *See infra* Appendix.

193. *See, e.g.*, Vladimir Shlapentokh, *How Putin's Russia Embraces Authoritarianism: The Case of Yegor Gaidar*, 40 COMMUNIST & POST-COMMUNIST STUD. 493, 493 (2007).

194. ENCYC. BRITANNICA, COLLAPSE OF THE SOVIET UNION (2020) [https://perma.cc/3T2T-AYKD]; ENCYC. BRITANNICA, HUNGARY IN THE SOVIET ORBIT (2020) [https://perma.cc/7BXN-SMJ7]; ENCYC. BRITANNICA, CZECHOSLOVAKIA (2020) [https://perma.cc/LAQ9-MLRH].

195. ENCYC. BRITANNICA, YUGOSLAVIA (2020) [https://perma.cc/H9H4-3KG4].

196. ENCYC. BRITANNICA, GREEK HISTORY SINCE WORLD WAR I (2021) [https://perma.cc/N3U9-DXUG]; ENCYC. BRITANNICA, PORTUGAL: THE DICTATORSHIP, 1926–74 (2021) [https://perma.cc/QLM6-L76P].

197. *See* Peter H. Solomon Jr., *Courts and Judges in Authoritarian Regimes*, 60 WORLD POLS. 122, 125–26 (2007) (reviewing LISA HILBINK, JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE (2007); TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT (2007); ANTHONY W. PEREIRA, POLITICAL (IN)JUSTICE: AUTHORITARIANISM AND THE RULE OF LAW IN BRAZIL, CHILE, AND ARGENTINA (2005)).

198. *See The 2019 EU Justice Scorecard*, *supra* note 183, at 44. *See also* Leonid Bershidsky, *supra* note 183.

seems that the judiciary is conceived of as relatively powerless—and, by extension, less prestigious—for reasons grounded in a mix of history and legal culture. And the professional prestige theory, of course, predicts that such low levels of professional prestige facilitate women's entry into the profession.

C. Closing Gendered Gavel Gaps in Contexts of High Professional Prestige

The professional prestige theory not only solves the puzzle of feminized civil law judiciaries: It also offers helpful context for understanding the numbers of women judges in other Western democracies.

Think, for example, about the gavel gaps observed in common law countries. According to the professional path theory, these gavel gaps result from the fact that women—due to biological constraints, private inequalities, and gendered biases—are at a relative disadvantage when selection for judgeship occurs at a late career stage and through unbureaucratic procedures. However, an underlying premise of this explanation is that the judicial profession is sought after by well-qualified, male lawyers. Otherwise, it would not matter that women in the legal profession were at a comparative disadvantage—women would win by walkover. In reality, of course, common law judgeships are (compared to most civil law judgeships) extremely prestigious, few and far between, and well-paid.[199] As a result, women aspiring to judgeship in common law countries are competing with the most ambitious and successful among their male colleagues for a very limited number of judicial posts—making the gendered setbacks underlying the professional path theory even harder to overcome.

The goal of this Note is not to argue that reforming professional paths to judgeship is fruitless—rather the opposite. Fashioning fair, bureaucratic and transparent judicial recruitment processes is an important first step, allowing women and men to compete on more equitable grounds. Countries and jurisdictions that have not yet reformed their traditional appointment processes—such as the United States—should consider doing so. And jurisdictions that already have undertaken reforms should keep working to ensure that their procedures are as transparent and fair as possible.

In a country or jurisdiction where the judiciary enjoys great social and political prestige, however, achieving parity will likely require one of two additional measures. The first alternative is to employ

199. *See supra* Section II.B.

quotas or affirmative action plans to force judicial parity. This has been done, to varying extents and with varying degrees of success, by reformed appointment-process jurisdictions.[200] However, this solution may create problems of its own. Whether affirmative action provides a desirable approach is a question well beyond the scope of this Note, but it is an important topic for future research. The second alternative is to attack the problems that underpin both the professional path theory and the prestige theory, namely the persistence of gendered stereotypes and inequalities. This, of course, is a daunting task—and one that cannot easily be delegated to any single actor in society.

First, it requires all of us, as individuals, to consciously and continuously confront our gendered perceptions—of ourselves, our partners, and our colleagues—to help create homes, schools, workplaces, and social arenas that do not hold women back.

Next, it requires that the institutions that surround us do the same. In the context of the legal profession in the United States, the institutions that wield the greatest power to level the playing field are the law firms and government agencies from which judges are recruited. Some of the issues that must be addressed for women to attain judgeship in greater numbers are directly connected with the business of law firms and other legal employers. Addressing problems such as workplace discrimination and unconscious gender biases against women should, of course, be given a high priority regardless of their effect on the judicial pipeline. Other problems that must be addressed for women to attain judgeship are only indirectly connected to the business of law firms—they are spillover effects from private gendered inequalities. There are, of course, limits to what law firms can do to neutralize gendered inequalities in the private relationships of its employees. However, it is well within the reach of big law firms to address some of these problems, and doing so may prove beneficial for the law firms as well.

Parental leave policies, for example, provide an excellent opportunity to counteract the tendency for women to take longer leaves and, later on, greater responsibility for childrearing. As of 2021, the parental leave policies of the vast majority of large American law firms continue to differentiate between "primary" and "secondary" caregivers.[201] While facially gender neutral, such policies have the effect of emphasizing the gendered pattern according to which women take

200. *See supra* Sections II.A. and II.B.

201. *See, e.g.*, Staci Zaretsky, *Yet Another Biglaw Firm Is Improving Its Parental Leave Benefits for Associates*, ABOVE THE LAW (Aug. 5, 2019, 11:17 AM) (noting nascent trend towards making parental leave available to both parents) [https://perma.cc/UTB3-2BL9].

longer leaves than men.[202] Parental leave policies that encourage heterosexual parents to take roughly equal amounts of leave would benefit women's career in multiple ways. First, and most obviously, such policies would equalize the playing field at work. Equalized leave policies would tighten the gap between the amount of leave taken by men and women, causing men and women to experience leave-related career setbacks at more equal rates. Further, such policies would reduce the perception that hiring women is more "expensive" than hiring men because women are entitled to more parental leave. Second, equalized leave policies would increase fathers' involvement with childrearing and sense of responsibility in the home.[203] This, in turn, would benefit women's careers by equalizing the playing field at home—potentially for the duration of the rest of their careers. Expanding parental leave programs, of course, is costly. However, there is reason to believe that law firms also stand to gain from neutralizing gendered inequalities. For one, clients are increasingly demanding diversity.[204] More importantly, however, law firms—like the judiciary—are missing out on valuable talent.

*Emilie Klovning**

202. David Collings et al., *How Companies Can Ensure Maternity Leave Doesn't Hurt Women's Careers*, HARV. BUS. REV. (Sept. 11, 2018) [https://perma.cc/22AS-5Q44].

203. *See generally, e.g.*, Erin M. Rehel, *When Dad Stays Home Too: Paternity Leave, Gender, and Parenting*, 28 GENDER & SOC'Y 110 (2014) (concluding based on a qualitative study of North American parents that taking extended leaves in connection with childbirth helps fathers develop a more active co-parenting role).

204. *See, e.g.*, Daniel S. Wittenberg, *Corporate Clients Demand More Diversity from Law Firms*, ABA (June 20, 2017) [https://perma.cc/76RL-L3VL]; Dylan Jackson, *Frustrated with Big Law Diversity, Many Companies Are Looking Elsewhere*, AM. LAW. (June 3, 2019) [https://perma.cc/396U-RC9X].

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APPENDIX

The numbers of women judges and judges per 100,000 capita are compiled and calculated based on data made available by the Council of Europe,[205] national and federal governments,[206] and legal organizations.[207]

Country	Legal system	% of women judges	Judges per 100,000 capita
Slovenia	Civil law	79	41.6
Latvia	Civil law	78	29.1
Romania	Civil law	74	24.1
Greece	Civil law	71	26.7
Croatia	Civil law	71	40.7
Serbia	Civil law	71	37.1
Hungary	Civil law	69	30.1
Luxembourg	Civil law	68	36.1
France	Civil law	66	10.8
Bosnia & Herzegovina	Civil law	64	28.9
Estonia	Civil law	63	17.7
Lithuania	Civil law	63	27.1

205. The numbers for the forty-seven member-states of the Council of Europe retrieved from the 2018 data are made available by the organization's European Commission for the Efficiency of Justice (CEPEJ). *See Dynamic Database of European Judicial Systems*, COUNCIL OF EUR.: CEPEJ [https://perma.cc/BM29-UVK8].

206. The numbers for the United States are in part compiled and calculated based on 2021 data made available by the Federal Judicial Center. *See* FJC, *supra* note 1. The numbers for New Zealand are compiled and calculated based on data made available by the national government of New Zealand. *See The Courts*, CTS. N.Z. [https://perma.cc/996U-HVSF]; *The Judges*, DIST. CT. N.Z. [https://perma.cc/B4KJ-4K9E]. The Canadian number is retrieved from data provided by the Canadian federal government and only reflects the number of federally-appointed women judges. *See Number of Federally Appointed Judges as of February 1, 2021*, OFF. OF THE COMM'R FOR FED. JUD. AFFS. CAN., https://www fja.gc.ca/appointments-nominations/judges-juges-eng.aspx [https://perma.cc/7KD7-Y3YB]. However, journalistic reports indicate that the ratio is near-identical for provincially-appointed judges. *See* Andrew Griffith, *Diversity Among Federal and Provincial Judges*, POL'Y OPTIONS (May 4, 2016) [https://perma.cc/Z33F-LPRC].

207. The numbers for the United States are in part calculated based on the American Constitution Society's compilation of 2014 data on American state courts. *See* ACS, *supra* note 1, at 18. The numbers for Australia are calculated based on 2020 data compiled by the Australasian Institute of Judicial Administration. *See* AIJIA, NUMBER AND PERCENTAGE OF WOMEN JUDGES AND MAGISTRATES AT 30 JUNE 2020 (2020).

Slovakia	Civil law	63	25.3
Czech Republic	Civil law	61	28.4
Russia	Civil law	61	15.2
Portugal	Civil law	61	19.2
Netherlands	Civil law	60	14.5
North Macedonia	Civil law	59	24.6
Finland	Civil law	58	19.6
Belgium	Civil law	56	13.3
Italy	Civil law	54	11.6
Spain	Civil law	54	11.6
Sweden	Civil law	53	11.9
Denmark	Civil law	53	6.5
Georgia	Civil law	53	8.2
Malta	Mix	51	9.5
Austria	Civil law	51	27.3
Cyprus	Mix	50	13.5
Albania	Civil law	48	12.1
Moldova	Civil law	47	16.4
Canada	Common law	45	—
Norway	Civil law	44	10.3
Switzerland	Civil law	43	14.4
New Zealand	Common law	41	4.9
Australia	Common law	39	4.3
Ireland	Common law	39	3.3
England and Wales	Common law	37	3.1
Iceland	Civil law	37	18.2
Northern Ireland	Common law	34	3.6
United States	Common law	30	3.5
Scotland	Common law	27	3.7